In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 561

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

ALMA MILLS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR ALMA MILLS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 8a-24a) is reported at 92 F. Supp. 728. The opinion of the Court of Appeals (R. 98-102) is reported at 192 F. 2d 133.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1951 (R. 102-103). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

In 1940 the respondent consented to a judgment of injunction restraining it from violating any of the provisions of the Fair Labor Standards Act. In 1949 the respondent moved that this injunction be vacated. In moving that the judgment be vacated the respondent alleged that the motion was based upon Sections 5 and 6 of Rule 60(b) of the Revised Rules of Civil Procedure and that the respondent had been in compliance with the requirements of the order of injunction since its entry in 1940. When this motion was heard the trial Court concluded that certain employees of respondent had performed work contrary to instructions which had been given them and without the knowledge or consent of the respondent. The trial Court also concluded in reference to this work that the employees were acting for their own benefit and against the orders and instructions of the respondent. Notwithstanding these findings of fact the trial Court adjudicated the respondent in civil contempt but vacated the injunction pursuant to Sections 5 and 6 of Rule 60(b) of the Revised Rules of Civil Procedure on the ground that it was no longer equitable for the judgment to have prospective application. The Court of Appeals reversed the Contempt adjudicating, basing its reversal upon the findings of fact of the trial Court, and affirmed the dissolution of the injunction.

The questions presented are:

(1) Whether a Court may dissolve an injunction issued pursuant to Section 17 of the Fair Labor Standards Act in the exercise of its inherent equity powers

and under Sections 5 and 6 of Rule 60(b) of the Revised Rules of Civil Procedure.

(2) Whether overtime work performed contrary to instructions and without the knowledge or consent of the respondent constitutes employment within the meaning of the Fair Labor Standards Act.

Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U.S.C. 201 *et seq.*), are set forth in the Appendix.

Statement

In the year 1940 the Administrator of the Wage and Hour Division brought an action to enjoin Alma Mills from violating the provisions of the Fair Labor Standards Act of 1938. Alma Mills did not contest this proceeding and consented to the entry of an injunction on August 23, 1940. In March of 1949 the respondent moved to vacate this judgment and on January 17, 1950 the Administrator filed his response in which he alleged that Alma Mills had violated the overtime compensation provisions of the injunction and in which he prayed that the motion to vacate be denied and that Alma Mills be adjudged in civil contempt.

The trial court adjudged Alma Mills in civil contempt and also vacated the injunction.

The Secretary of Labor appealed from that part of the judgment vacating the injunction and the respondent appealed from that part of the judgment adjudicating it in civil contempt.

The Court of Appeals held with Alma Mills, the respondent on both issues, reversing the adjudication in contempt and affirming the vacation of the injunction.

Argument

1. The Petitioner, in its Petition for the Writ of Certiorari is apparently relying almost exclusively, upon the decision of this Court in *U. S.* v. *Swift & Co.*, 286 U.S. 106. In that case this Court left no doubt as to the power of a Court of equity to modify or vacate a decree of injunctions. This opinion at page 114 specifically stated that:

> "We are not doubtful of the power of a Court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. The power is conceded by the Government, and is challenged by the intervener only. We do not go into the question whether the intervention was so limited in scope and purpose as to withdraw this ground of challenge, if otherwise available. Standing to make the objection may be assumed, and the result will not be changed. Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. *If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.*" • • •
> "The distinction is between restraints that give

protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative." • • • "The result is all one whether the decree has been entered after litigation or by consent." • • • "In either event, a Court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument or wrong." • • • "*All the parties to the consent decree concede the jurisdiction of the Court to change it.*" • • • "*The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.*

It can thus be seen from the above portion of the *Swift* opinion that this Court clearly and unequivocally decided that a Court of equity has the power and the jurisdiction to revoke or modify an injunction. We read this opinion to mean that if the conditions which existed at the time the decree was entered and which caused the Court to grant the injunction have been removed or if such conditions no longer exist, that the removal or the absence of these conditions constitutes a sufficient change of condition to meet the tests set forth in the *Swift case*. There is actually no other logical conclusion that can be reached, particularly with reference to injunctions which have been decreed

pursuant to Section 17 of the Fair Labor Standards Act. This section of the Act, which is set forth in the appendix, confers jurisdiction upon the various District Courts to restrain violations of said Act only *for cause shown.* Certainly, if the cause shown to the Court which warranted the injunction to be decreed has been eliminated, a change of condition within the meaning of the *Swift case* has taken place which will warrant the removal of the injunction. Furthermore, we feel that the power or jurisdiction of a Court of equity to grant an injunction should be the same as the power or jurisdiction to modify or vacate. Actually, power is discretionary to grant an injunction and the power should be the same to vacate or modify.

Actually there are many cases in which an injunction has been denied when violations of the Act have been proven but have been discontinued. This Court held in *Walling* v. *Youngerman-Reynold's Hardwood Co.,* 325 U.S. 419 that the discontinuance of violations may justify the Court's refusal to enjoin future violations "when it is combined with a bona fide intention to comply with the law and not to resume the wrongful Act."

Certainly, if a Court in the exercise of its discretionary powers may refuse to issue an injunction when violations have been proven, a Court in the exercise of this same discretionary power may remove, vacate or modify an injunction when it is convinced that the wrongful act or acts enjoined are not likely to be resumed.

In the case now before the Court, the Circuit Court of Appeals, reversing the opinion of the District Court found that the Respondent had complied with the requirements of the Act and with the terms of the injunction since the decree was entered in 1940 or for a period approximating ten years. We submit that compliance with the statute and with the injunction are the only means at the disposal of the Respondent to convince the Court that the wrongful acts are not likely to be resumed and that compliance in and of itself constitutes a change of conditions within the meaning of the *Swift case*.

To express our position otherwise, if a Court of equity in the exercise of its discretionary powers is justified in refusing to issue an injunction in spite of the fact that the defendant has violated the law, why is not a Court justified in removing an injunction (in the exercise of these same discretionary powers) when it has been established that the employer under the injunction has complied with the statute and the injunction for a period of ten years?

Notwithstanding our position that the *Swift case* supplies ample precedent to justify any court in vacating or modifying an injunction issued under the Fair Labor Standards Act, the facts of that case, as we interpret them, are entirely different from and cannot be reconciled with the case now before the Court.

To illustrate this, it is significant that the activities which were restrained in the *Swift case* would be legal and lawful activities for the vast majority of business enterprises to engage in. In reality, the petition for

modification of the injunction in that case was in actuality a petition for a judgment of the court declaring certain business activities to be legal and lawful and not constituting a monopoly so that the petitioner could re-enter certain fields of business. If the injunction had been modified as proposed in that case there would have been nothing to prevent the petitioner from engaging in activities which were found to be in violation of the Anti-Trust laws. The petition in that case was actually a petition for a declaratory judgment. In simple language the petitioner in the *Swift case* asked the court if it might re-enter the grocery business and the Supreme Court said that it could not, because to do so would still constitute a monopolistic practice.

In the case now before the Court the respondent is under the same restraints with the injunction dissolved as it was while the injunction was in effect. We did not ask the court to declare certain activities to be legal and lawful. The statute is definitive of what is legal and what is unlawful and the injunctions contained in the Act with the specific penalties for a violator are sufficient without an order of the court to enjoin and deter the respondent from committing any wrongful act under the law in the future.

We are actually fearful that if the Secretary of Labor prevails in this case that the ultimate result will be that the Administration of the Fair Labor Standards Act will, by the gradual processes of our judicial system, be permanently transferred from the Secretary of Labor and the Administrator of the Wage

and Hour Division to the various District Courts of the United States. The Solicitor General in his brief frankly asserts that enforcement of the Fair Labor Standards Act is easier and more economical with reference to an employer who may be under an injunction. Furthermore, it has been the law of the land since the occasion of the decision of this Court in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 that the enforcement penalties or sanctions that may be imposed against an employer under an injunction are much more severe than the penalties or sanctions that can be imposed upon an employer who is not under an injunction.

To illustrate the above, if an employer is not under an injunction, Congress has not conferred upon the Administrator the right to bring an action to collect back wages for an underpaid employee, unless such employee requests the Administrator in writing to bring such an action. Furthermore, the Administrator by the terms of Section 17 of the Statute is deprived of the right to bring suit for unpaid wages in suits brought for injunctions pursuant to Section 17. By so depriving the Administrator and the Secretary of Labor of the right to collect unpaid wages for employees, Congress, no doubt, desired that this remedy be exclusive with the employee.

On the other hand, an employer, who ten years ago was enjoined pursuant to Section 17, of the Act, is subject to an action for unpaid wages by the Secretary of Labor or the Administrator at any time for even unintentional violations of the statute and in addition

thereto is liable for the costs of the government in investigating the case and in presenting the case to the court.

The result of this theory of law is to place an undue hardship upon the employer which is entirely inconsistent with all principles of justice. We need go no further than this case now before the court to illustrate this point.

The trial court found in this case that a total amount of $1,496.06 was due to 14 employees. It also found that $2,451.78 represented the costs of investigation and of presenting the case to the Court. It appears to the respondent that these two total amounts bear a dispropotionate ratio to one another.

Since the Secretary of Labor has no statutory authority to collect back wages by way of injunction and since he has no legal means of requiring an employer to pay his expenses of investigating an employer who is not under an injunction, we can take no other position in this case than to believe that his efforts here are for the purpose of transfering the enforcement of the Fair Labor Standards Act to the various District Courts of the United States. This we do not believe should be done by the injunctive process of our equity Courts.

It may well be that the real question for this Court to decide in this case is whether the administration of the Fair Labor Standards Act shall remain in the Secretary of Labor and the Administrator of the Wage and Hour Division as directed by Congress or whether the administration of this act shall be performed by

injunctive decree in the various District Courts of the U. S.

In any event we feel that the above is the real question before the Court.

2. The petitioner contends that the decision below is in conflict with the decisions of the Eighth Circuit in *Lenroot* v. *Interstate Bakeries,* 146 F. 2d 325, and of the Tenth Circuit in *Handler* v. *Thrasher,* 191 F. 2d 120. As we interpret these decisions, neither is in any way in conflict with the case now before the Court for in each of these cases the employer had knowledge of the employment and in neither case was the employment performed contrary to the instructions of the employer. We shall consider and distinguish these cases separately.

The petitioner, on page 24 of his brief states that in the *Interstate Bakeries case* that the Eighth Circuit held that defendant corporation and its officials were responsible under the Act for work performed by minors in this business *despite the trial court's finding that such work was neither authorized or known by them.* In reading the decision of the trial court in the *Interstate Bakeries case* (the trial court's opinion is reported at 55 Fed. Sup. 234) and the decision of the Eighth Circuit we can find no justification or authority for this statement. Actually, the trial court in that case found that "* * * the tremendous pressure and stress of war demands had caused one of the plant foreman to relax and evade the rule * * *" Furthermore the trial court stated that "* * * it is contended by the plaintiff that as an earnest of the

defendant's good faith the foreman who employed a minor in the face of the law and with knowledge of its provisions should have been discharged." "* * * In this case the foreman frankly acknowledged his act."

By reason of the findings of the trial court which are set forth above we cannot reconcile the statement above referred to in the petitioner's brief with the findings of the trial court. It is clear, that if we are to accept the findings of the trial court, upon which the petitioner is relying, the foreman in that case, who no doubt had been delegated the authority as an agent of the corporation to employ personnel, employed the "oppressive child labor" in utter disregard of the law with full knowledge that what he was doing was in violation thereof. Of course under such circumstances the corporation would be and should be responsible for the improper deeds of its responsible agent.

In spite of the findings of the trial court referred to above in the *Interstate Bakeries case* the opinion of the Eighth Circuit on the appeal in that case accepted a different view of the facts. The appellate court concluded that the foreman who employed the "oppressive child labor" "* * * did not know it to be unlawful to employ children under sixteen years of age" and the court properly concluded in effect that ignorance of the law excuses no one.

It can thus be seen that it makes no difference whether the decision of the trial court or the decision of the Eighth Circuit is accepted, neither is in conflict with the case now before the court. There is nothing in the record of this case to even indicate that any

official, foreman, second hand, or responsible agent of the respondent had any knowledge that the work in question was being performed. Even if the record did indicate otherwise there has been no appeal in this case from the findings of fact of the trial court that the work was performed contrary to instructions and without the knowledge of the respondent. In the absence of an appeal and a reversal of these findings the petitioner should not now be permitted to seek such a reversal. Furthermore, the respondent, in the case now before the court has never attempted to justify the work in question on the ground that it did not know the work to be unlawful. On the contrary we would concede that had the respondent known that the work was being performed and had the respondent "suffered and permitted" such work that such would constitute employment within the meaning of the Act. However, such are not the facts in this case.

Neither is the decision below in conflict with the opinion of the Tenth Circuit in *Handler* v. *Thrasher,* 191 F. 2d 120. In that case the employer attempted to enter into a contract of employment with the employee-plaintiff under which no overtime was to be paid for hours worked over 40 in any week unless the employee furnished a statement thereof to the employer at the end of each month. The court held that the contract was unenforceable and that the employee could recover for unpaid overtime which he had worked. The court further held that the employer knew that the employee was working overtime and that the contract had for its very purpose the circumvention and evading of the

Wage and Hour Act. The language of the court on this point is as follows:

> "It is true, as appellant suggests, that the employee agreed not to work more than eight hours a day, or to claim compensation in excess of forty hours a week. But it is too well settled to admit of discussion that a contract which has for its purpose, or which has the effect of circumventing or invading the command of the Wage and Hour Act, is invalid and unenforceable." * * * "Here the employee was directed to perform certain duties incident to the pumping of the wells, and the employer *knew* that he was on duty seven days per week. He *well knew* the nature of the work his employee was required to and did perform. *If, as the trial court found, the employee worked more than eight hours a day, the employer knew it, and he also knew that he was working seven days per week, because he was on the lease almost daily.*"

It is therefore apparent that there is no conflict between the *Handler case* and the decision of the court below, for in the *Handler case* the employer had actual knowledge that the overtime work was being performed and such was "suffered and permitted" by him, while in the case now before the court neither the employer nor any responsible foreman or agent had any knowledge that the work was being performed. Furthermore, the employees had been specifically instructed not to perform this work.

The petitioner also contends that the reversal of the adjudication in civil contempt is inconsistent with this

Court's decision in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187. In that case the employer, which was under an injunction similar to the one in question in the case now before this court, had set up various systems of payment which were subsequently found to be in violation of the law. Specifically the trial court found that: "respondents had set up a completely false and fictitious method of computing compensation without regard to the hours actually worked which were under the Act; (2) respondent had adopted a plan which gave the employees a wage increase in the guise of a bonus and yet excluded that increase from the regular rate of pay for the purpose of computing overtime; (3) respondents had classified some employees as executive or administrative employees in plain violation of the regulations of the Administrator adopted under 13(a) (1) of the Act; and (4) one of the respondents had employed pieceworkers in excess of the maximum workweek without paying them overtime compensation."

It can thus be seen that in the *Jacksonville case* the employer had full knowledge of what he was doing and when his acts were subsequently determined to be in violation of the law this court said "They took a calculated risk when under the threat of contempt they adopted measures designed to avoid the consequences of the Act."

It can thus be seen that there is no conflict between the decision below and the decisions of this court in the *Jacksonville Paper Co.*, the *Interstate Bakeries* and the *Handler cases* and that the real question before

the Court is whether an employer may be held liable under the Fair Labor Standards Act for work performed contrary to his instructions and without his knowledge.

We need go no further than the definition of the term employ contained in Section 3(g) of the Fair Labor Standards Act to arrive at the only logical answer to this question. This definition is set forth in the appendix and the term employ is defined to "* * * suffer or permit to work."

No authority can be found where employment under the Fair Labor Standards Act was found to exist when the work performed was done contrary to the instructions of the employer and without his knowledge.

We feel that it is unnecessary to state that unless work is performed within the meaning of the statutory defiintion of the term "employ" an employer cannot be held responsible for such work.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari be denied.

Pinckney L. Cain,
Columbia, S. C.,
Attorney for the Respondent.

Of Counsel:

Zach McGhee,
Columbia, S. C.

J. Claude Fort,
Gaffney, S. C.

Appendix

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U.S.C. 201.

Sec. 3. As used in this Act—

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

Sec. 17. The district courts of the United States * * * shall have jurisdiction, for cause shown, * * * to restrain violations of section 15: Provided, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.